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No. 9985

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SAN FRANCISCO LAUNDRY ASSOCIATION (a corporation),
Appellant,

vs.

AMERICAN TRUST COMPANY,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF FACTS.

The appellant, San Francisco Laundry Association, is a California corporation, organized for the purpose of carrying on and conducting "in all its branches the business of a laundry in the City and County of San Francisco, and such other business as may be connected therewith or necessary for the prosecution thereof". (R. 47.) Until 1936 it carried on a general laundry business. Under date of May 29, 1936, it transferred and assigned to A. L. May all of its assets other than real property in trust for the benefit of its unsecured creditors. (R. 4 and 48.) The trustee operated the business until November 12, 1938, at which time the trustee sold all of the appellant's laundry equipment and other assets (except real

estate), and applied the proceeds to the payment of the appellant's unsecured creditors. (R. 38.) The building in which the laundry had previously been conducted was wrecked and converted into a parking lot. Since the sale of the personal property by the trustee, the appellant has not conducted any business other than the collection of rents from its real estate and the sale and liquidation of its assets. (R. 38.) Appellant has no unsecured creditors and but two secured creditors, the appellee American Trust Company and Florence Brownfield. (R. 9, 10, 38 and 70.) The indebtedness owing to the American Trust Company exceeds the sum of $39,000.00 (R. 32, 61, 71 and 123 and is secured by a deed of trust on all but a small portion of the appellant's real property. (R. 10, 71.) The indebtedness to Florence Brownfield according to the appellant's schedules amounts to $3500.00 (R. 11), and is secured by a deed of trust on the remainder of the appellant's real estate which appellant in its schedules and in the plan proposed by it conceded to have a value less than the indebtedness. (R. 11 and 70.) According to the testimony of the witnesses produced by the American Trust Company (R. 28 and 30), and the appraisement made by the appraiser appointed by the court (R. 50), the value of the real estate subject to the deed of trust securing the indebtedness owing to the American Trust Company does not exceed $30,000.00, and the value of the property subject to the deed of trust securing the indebtedness to Florence Brownfield does not exceed the sum of $3200.00 (R. 50.)

Aside from the real estate subject to the two deeds of trust mentioned, the appellant has no assets excepting receivables in the amount of $985.00, contracts of conditional sale on which there is owing not to exceed $1612.00 and certain office furniture and fixtures having a value of less than $300.00. (See Appellant's Schedules at pages 11 and 12 of Record and the Proposed Plan of Reorganization at page 61 of the Record.)

Nothing has been paid on the indebtedness owing to the American Trust Company since October 1939, with the exception of one payment of $500.00, which was made in January, 1940. (R. 123.) The appellant has for several years failed to pay the taxes on the real estate hypothecated to American Trust Company (R. 123), but has nevertheless collected rents aggregating approximately $200.00 per month, the greater part of which has been paid to the president of the corporation, who has received a salary of $150.00 per month since before the commencement of this proceeding. (R. 37 and 39.)

The appellant being in default in the payment of the obligation owing to it, the American Trust Company, recorded a notice of default and proceeded to have the property covered by the deed of trust advertised for sale. Thereupon, the appellant filed its petition for corporate reorganization in this proceeding and obtained an order restraining the American Trust Company and the trustee under the deed of trust from proceeding to sell the property. The American Trust Company filed an answer herein con-

troverting certain allegations contained in the appellant's petition and particularly controverting the allegations that the petition was filed in good faith, and that appellant's assets exceeded its liabilities. (R. 20 et seq.) The issues raised by the answer were referred to Hon. Burton J. Wyman for hearing and report. (R. 27.)

Before the Special Master rendered his report thereon, the appellant filed herein a proposed plan of reorganization. (R. 60 et seq.) Briefly summarized, the plan provided that the property subject to the deed of trust in favor of Florence Brownfield should be conveyed to her in satisfaction of the indebtedness thereby secured; that a street fifty feet in width would be cut through the center of the property subject to the American Trust Company's deed of trust and donated to the City and County of San Francisco; that the remainder of the property should be subdivided into lots; that the cost of paving the street and subdividing the property and erecting dwelling houses thereon should be paid by the issuance of appellant's certificates which would take priority over the American Trust Company's deed of trust; that the indebtedness due the American Trust Company be reduced from an amount in excess of $39,000.00 to approximately $30,000.00, and the interest rate thereon reduced from six to four per cent per annum; that all of the balance of the indebtedness due the appellee should be canceled by the issuance of preferred stock; that such preferred stock should have an absolute liquidation preference *but should not be preferred*

either as to dividends or voting, each share of common stock and each share of preferred being entitled to the same vote and dividend; that dwelling houses should then be constructed on the lots and that the American Trust Company should take its chance on recovering anything on the indebtedness owing to it and the preferred stock to be issued to it on the appellant's being able to sell the houses at a profit; that in the meanwhile the president and present counsel of appellant should be paid a salary of $150.00 per month.

Promptly upon the filing of the plan, the American Trust Company filed objections thereto on the ground that it was unfair and inequitable in each of the following particulars (R. 77 and 78):

1. That the appellant was insolvent, and said plan contemplated the realization by the appellant and its stockholders and officers of money, assets, and property at the expense of the creditor.

2. That the plan contemplated the creation of a prior encumbrance upon the property hypothecated to the creditor, notwithstanding the fact that the obligations due from the appellant to American Trust Company far exceeded the value of that property.

3. That the plan discriminated unjustly in favor of Florence B. Brownfield and against American Trust Company, in that it contemplated that the property hypothecated to Mrs. Brownfield should be conveyed to her in satisfaction of the obligations owing to her, but contemplated that the property hypothecated to American Trust Company should be retained by the appellant.

4. That the plan provided for the scaling down of the indebtedness owing to American Trust Company.

5. That the plan contemplated that the assets of the appellant should be used in a speculative venture for which there is no reasonable prospect of success.

It prayed that the plan be disapproved and the proceedings dismissed or the appellant adjudicated a bankrupt.

Thereafter, an order was made that the issues raised by the objections to the plan be referred to Burton J. Wyman as Special Master, to take testimony and report to the court. In pursuance of this order of reference, the Special Master held a hearing on the objections, and the matter was submitted on briefs.

On July 24, 1941, the Special Master submitted his certificate and report on the issues raised by the answer of the American Trust Company and the objections of the American Trust Company to the proposed plan of reorganization. (R. 1 to 100, inclusive.) The Special Master concluded his report as follows:

> "Although there have been hearings on two different matters in connection with this debtor proceeding, as is shown in detail by the record herein, I am of the opinion that the court can best deal with the pending questions on the basis of American Trust Company's prayer at the end of its objections 'that said plan of reorganization be disapproved and that the proceedings be dismissed or Debtor adjudicated a bankrupt.'

> Proceeding on the theory just stated, I find from the record that each and all of said objections are true, and I therefore conclude, as matter of law, that said objections are sufficient upon which to base an order disapproving the proposed plan of reorganization and dismissing the debtor's proceeding, or an order adjudicating said debtor a bankrupt.
>
> I therefore respectfully recommend that the court make one or the other of the aforesaid prayed for orders." (R. 97-98.)

The appellant filed exceptions to the certificate and report of the Special Master. (R. 100 to 102, inclusive.)

On September 12, 1941, the court made an order affirming the Special Master's certificate, overruling the appellant's exceptions thereto, disapproving the plan of reorganization and dismissing the proceedings. (R. 103 and 104.)

On October 9, 1941, the appellant filed a motion with the court requesting leave within such time as the court might prescribe to amend its plan of reorganization or to submit an alternative plan. (R. 104.) In support of this motion the appellant submitted an affidavit of Charles M. Bufford, the president, principal stockholder and present counsel for appellant, to the effect that if leave were granted by the court the debtor would propose a plan containing the following provisions:

> "Extension of maturity of the mortgage trust deeds held by the debtor's two creditors until

one year after the President shall proclaim the end of the present National Emergency, subject to an earlier sale of the property subject to either trust deed, or any part thereof, by mutual consent of the parties thereto; in the meantime one-half of the gross income of the property subject to each trust deed to go to the holders thereof, such holders to pay the taxes, the other half to go to the debtor, the debtor to be responsible for the maintenance and upkeep; interest to be reduced and penalties set aside; the court to reserve jurisdiction of the case for the purpose of authorizing improvements on any of the property in the event the same became desirable and issuing certificates of indebtedness in payment, if hereafter found proper in the sound discretion of the court;" (R. 107, 108.)

On October 22, 1941, the court made the following order:

"The motion to amend order entered September 12, 1941 having been submitted and fully considered, the Court finds that upon the facts as presented to the Court and upon the Report of the Special Master (heretofore approved), no plan could be proposed which would be acceptable under the provisions of the Bankruptcy Act, and, therefore, It is Ordered that the said motion to amend order of September 12, 1941 be and the same is hereby denied." (R. 109.)

ARGUMENT.

THE COURT HAD NO ALTERNATIVE EXCEPT TO DISMISS THE PROCEEDINGS.

This proceeding involves but one disputed issue of fact, namely, the value of the property subject to the deed of trust in favor of American Trust Company. All other facts were admitted. That appellant's indebtedness owing to American Trust Company amounted to more than $39,364.28, and its indebtedness to Mrs. Brownfield to more than $3517.17 was also conceded by the appellant. (R. 61.) That the appellant had no unsecured creditor and but two secured creditors, American Trust Company and Florence Brownfield, was likewise conceded by appellant. (R. 70 and 72.) That the appellant owned no real estate except the property subject to the deed of trust in favor of American Trust Company and the property subject to the deed of trust of Florence Brownfield was also admitted by the appellant in its schedules. (R. 10 and 11.) That the value of the property subject to the Brownfield deed of trust was less than the obligations secured by that deed of trust was admitted by appellant both in its schedules and in the proposed plan of reorganization. (R. 11 and 70.) That the value of all the appellant's personal property, including cash, contracts, receivables, and furniture and fixtures did not exceed $2976.43 was also admitted by the appellant. (R. 69.) The one disputed issue of fact, namely, the value of the property subject to the deed of trust in favor of the American Trust Company was decided adversely to the appellant by the Special Master. By his finding that appellant was insolvent

(R. 77 and 98), the Special Master found that the value of the property subject to the American Trust Company's deed of trust was less than the obligations secured by the deed of trust. This finding was supported by the testimony of two witnesses (R. 28, 30, and 50), and by the appraisement of an appraiser appointed by the court, and having been approved by the District Court cannot be disturbed on appeal. Remington on Bankruptcy, Sec. 3803 and cases cited. *In re Willoughby,* 95 Fed. (2d) 932.

The one and only question presented on this appeal is, therefore, one of law,—whether it was "unreasonable to expect" that a plan of reorganization could be effected. For if it was unreasonable to expect that a plan of reorganization could be effected, appellant's petition for corporate reorganization was not filed in good faith (Bankruptcy Act, Sec. 146), and the court would have no other alternative than to dismiss the proceedings. (Bankruptcy Act, Sec. 148.) That it was unreasonable to expect that a plan of reorganization could be effected is, it is submitted, so clear as not to require argument. The only plan which could be proposed would be one that required the creditors to share their inadequate security with the insolvent debtor. Such a plan is not fair or equitable and cannot be effected under Chapter X of the Bankruptcy Act. This was expressly decided by the United States Supreme Court in *Case v. Los Angeles Lumber Products Company,* 308 U. S. 106, and this Court in *Chapman Bros. Co. v. Security First National Bank of Los Angeles,* 111 Fed. (2d) 86. In fact, the present

case can scarcely be distinguished from the case last cited. In that case a petition for reorganization was filed by a debtor under Chapter X. According to the petition it had assets of $3,095,802.65, and a net worth of $789,880.15. Of the assets, it was alleged that that $3,058,350.00 represented the value of real estate covered by various deeds of trust given as security for obligations amounting to $2,139,338.03. The Security First National Bank of Los Angeles filed an answer alleging that it held obligations of the appellant aggregating $1,666,270.79, secured by various deeds of trust upon eighteen parcels of real property, and that the reasonable market value of said parcels did not exceed $997,000.00. The answer further alleged that the reasonable market value of the real property owned by the debtor did not exceed the sum of $1,-262,736.00 instead of $3,058,350.00 as alleged by the debtor. The trial court found that the indebtedness of the debtor corporation exceeded its assets by over a million dollars and that the debtor was hopelessly insolvent. Upon these findings the court concluded that the appellant's petition was not made in good faith; that it was unreasonable for the debtor corporation to expect that any plan of reorganization could be effected. The court dismissed the petition. Thereupon, an appeal was taken in the Circuit Court of Appeals for the Ninth Circuit. In affirming the order of the district court dismissing the petition, the Circuit Court of Appeals said:

> "If the findings of the trial court are sustained by the evidence it is clear that the proposed plan of reorganization is lacking in good faith under

the express definition thereof contained in the Chandler Act, Sec. 146, 11 U.S.C.A. Sec. 546, which provides that 'a petition shall be deemed not to have been filed in good faith if * * *

(3) It is unreasonable to expect that a plan of reorganization can be effected.'

Such a lack of good faith requires a dismissal of the petition.

(1, 2) It is unnecessary to elaborate this question of 'good faith' in a petition for reorganization, as it has been so recently considered by this court (*Provident Mt. Life Ins. Co. v. University Ev. L. Church,* 9 Cir. 90 F. 2d 992) and by the Supreme Court. *Tennessee Pub. Co. v. American Natl. Bk.,* 299 U. S. 18, 57 S. Ct. 85, 81 L. Ed. 13, and *Case v. Los Angeles Lbr. Prod. Co., Ltd.,* 308 U.S. 106, 109, 60 S. Ct. 1, 84 L. Ed. .... The case last cited is directly applicable to the facts of this case, for it was there held that any plan which required a secured creditor to share his inadequate security with an insolvent debtor was unfair and inequitable within the meaning of the Bankruptcy Act. Sec. 77B, sub. f, 11 U.S.C.A. Sec. 207, sub f."

In view of these decisions, the court had no alternative except to dismiss the proceedings.

APPELLEE'S ANSWER WAS NOT FILED TOO LATE.

Appellant argues that the answer of American Trust Company to the petition for corporate reorganization was filed too late, and the allegations of the petition, showing that the debtor is not insolvent

in the absolute sense, must be deemed admitted for all the purposes of the case.

In presenting this argument, appellant is grasping at a straw.

The court originally set April 7, 1941, as the date for hearing under Section 161 of the Bankruptcy Act. The American Trust Company filed its answer on April 14, 1941. On that day the court made a minute order, and on April 16, 1941, a formal engrossment thereof referring the issues raised by the answer to the Special Master. The Special Master held hearings thereon which were attended by counsel for appellant. Every one concerned, the court, the Special Master, and the debtor, treated the answer as having been timely filed. No default was entered, and no motion to strike the answer was made. In fact, the debtor at no time raised the point that the answer was not seasonably filed until its brief was filed herein. It is well settled that the failure to have a default entered against a party required to file a pleading operates as an implied extension of time to such person within which to file his pleading. (*Baird v. Smith,* 216 Cal. 408.) It is equally well settled that a point or argument such as made by appellant cannot be raised for the first time on appeal. (Remington on Bankruptcy, Sec. 3808.)

Appellant is, moreover, scarcely in a position to raise the point. According to the record, the time within which appellant had to propose a plan of reorganization expired on April 29, 1941. (R. 27 and 28.) The plan was not filed until May 31, 1941. (R.

60, et seq.) Section 238 of the Bankruptcy Act provides that when a plan is not filed within the time prescribed by the court, the court may dismiss the proceedings. Whether it should or not is a matter of discretion with the exercise of which this court will not interfere. (*Oakland Hotel Company v. Crocker First National Bank* (C.C.A. 9), 85 Fed. (2d) 959.) So far as the record is concerned, the appellant has no cause for complaint in respect to the dismissal of the proceedings.

In fairness to the court, however, although it does not appear in the record, the hearing under Sec. 161 was continued, and appellee's time to file its answer was extended from April 7, 1941, to April 14, 1941, by agreement between Mr. Robert B. Gaylord, Jr., who represented the debtor at the time and who withdrew from this case when the present appeal was filed, and the appellant's time for filing its proposed plan was extended by court order to a date after May 31, 1941. The act of appellant's learned counsel in urging that the answer was not seasonably filed can only be justified by his undoubted ignorance of the abovementioned agreement and his excusable and very human desire to continue for a few more years the income of $150.00 a month which he has heretofore enjoyed at the expense of the nonpayment not only of anything on the indebtedness due the American Trust Company but also taxes on the property securing that indebtedness.

THE MASTER'S CERTIFICATE AND REPORT WAS NOT DEFECTIVE.

Appellant urges next that the Master's report was defective in not making findings on the issues raised by the answer. The point is not well taken. It is well settled that no findings are required in respect to facts not in dispute. Here the only fact in dispute was whether appellant was insolvent. As to that fact the Master found that the appellant was insolvent. (R. 77 and 98.)

Furthermore, the question is really moot. Section *236* of the Bankruptcy Act provides that when a plan is not approved the court may dismiss the proceedings. Whether the court should or not is largely a matter within the District Court's discretion with which this court will not interfere in the absence of a clear abuse thereof. (*Oakland Hotel Company v. Crocker First National Bank,* 85 Fed. (2d) 959.) Here the plan was disapproved and certainly it cannot be said that there was any abuse of discretion, particularly in view of the fact that no plan satisfying the requirements of *Case v. Los Angeles Lumber Products Co.,* 308 U. S. 106, could be effected.

THE FINDING OF INSOLVENCY IS SUSTAINED BY THE EVIDENCE.

The appellant further argues that the finding of insolvency is not sustained by the evidence. The debtor conceded that its liabilities amounted to $43,001.45 (R. 61); that the value of its assets exclusive of real

estate was $2976.43 (R. 61); and that the property covered by the deed of trust to Florence Brownfield was $2500.00. (R. 9, cf. R. 70.) Two witnesses (R. 28 and 30) and the court's own appraiser (R. 50) fixed the value of the debtor's remaining real estate at $30,000.00. Certainly on this showing the debtor was insolvent. It is true that appellant's president, principal stockholder and present counsel testified that the real property last mentioned had a greater value, but his testimony merely created a conflict in the evidence. The Special Master's finding being supported by some evidence and having been approved by the District Court will not be disturbed on appeal. Remington on Bankruptcy, Sec. 3803.

THE PLAN SCALES DOWN THE INDEBTEDNESS TO AMERICAN TRUST COMPANY, UNJUSTLY DISCRIMINATES AGAINST APPELLEE, CONTEMPLATES A SPECULATIVE VENTURE WHICH HAS NO REASONABLE PROSPECT OF SUCCESS AND PROVIDES FOR THE CREATION OF A PRIOR INDEBTEDNESS.

It is apparent from the plan itself that it contemplates the scaling down of the indebtedness owing to the American Trust Company. The indebtedness amounting to $39,364.28 is to be reduced to something below $30,000.00, and the interest rate from 4% to 6% per annum. The balance of the indebtedness owing the American Trust Company for accrued interest is to be satisfied by the issuance of preferred stock (preferred only as to liquidation), which in view of the fact that the property is worth no more than $30,000.00 will be absolutely worthless. That the

venture upon which the appellant's assets are to be used according to the plan is a speculative one is self-evident. There is no assurance that the dwellings to be erected on the property will sell for an amount sufficient to cover their cost and the encumbrances thereon.

As for the Special Master's findings that the plan presents no reasonable prospect of success, we submit that they are amply supported by the evidence quoted at length in the Special Master's certificate. It is true that Mr. Bufford, the president of appellant and owner of a majority of its stock, testified that there was a reasonable prospect of success and that the value of the property subject to the deed of trust was in excess of the amount of the indebtedness. It should be borne in mind, however, that Mr. Bufford is the one who will be primarily interested in the matter and that his testimony must, therefore, be regarded as colored by interest. On the other hand, the expert witnesses produced by the American Trust Company testified to the very contrary. The Special Master heard the evidence, and we submit that his findings are entitled to respect.

THE NINTH AND TENTH SPECIFICATIONS OF ERROR ARE UNTENABLE.

In its brief appellant states:

> "The debtor's exceptions 9 and 10 attack the ruling of the Special Master, affirmed by the district court, that the only question before him was the value of the property in question at the time

> of his hearing, in its then present condition, and his refusal to consider its value were the plan of reorganization carried out.
>
> The debtor's contention is that the relevant inquiry is the value of the property if the plan is carried out." (App. Brief, 31 and 32.)

The conclusive answer to this argument is that the Special Master did not rule that the only question before him was the value of the property at the time of the hearing in its then condition and that there is nothing in the record to show that he failed or to consider evidence as to what the value of the property would be if the plan were carried out. What transpired was this: At the hearing on the plan appellee offered in evidence the evidence that was introduced at the hearing on the issues raised by the answer. Appellant's counsel stipulated that it might be admitted, subject to the objection, the testimony as to the present value of the property in its existing condition was immaterial. (R. 85.) Counsel for appellee then stated in effect that as the venture contemplated by the plan was purely speculative and the primary question was whether the creditors alone were entitled to vote on the plan, only evidence as to the present value was material. The following colloquy then took place between the Special Master and counsel for appellant:

> "The Master. I think so, Mr. Gaylord; otherwise you are speculating on what maybe will happen in the future.
>
> Mr. Gaylord. Of course, that is necessarily true of any reorganization, is it not, your Honor,

whether the business can be operated at a profit or not? Which comes back to the same thing: whether its product, whatever it may be, can be sold at a profit.

The Master. That is true, but so far as fixed assets are concerned, you have to take them at the present value.

Mr. Gaylord. I would like to submit authorities on that point. But I have no objection to stipulating, as Mr. Dreyer suggests, except for the objection just made.

The Master. *As I recall it, there is expert testimony both ways on the matter as to whether or not they could be subdivided.*

Mr. Dreyer. That is correct.

Mr. Gaylord. If my recollection is correct, I believe Mr. Banker—I have forgotten the name of the other man who testified—testified he had not considered the property as subdivision property.

The Master. He said because he knew something about the cost of subdividing, and it could not be done.

Mr. Gaylord. He also placed the cost of the utilities at $15,000 against $4000.

The Master. I understand, but that is a difference of opinion there as to who is right." (R. 86 and 87.) (Emphasis supplied.)

From the foregoing it is obvious that the only question then before the Special Master was whether evidence as to present value was admissible. Whether evidence as to what the value would be if the plan were carried into effect would be admissible was not then before the Special Master. It is also obvious from the language italicised above that the Master

had in mind the testimony as to what the value would be if the property were subdivided and that he was giving consideration to it.

As the Special Master said, evidence was introduced by both sides as to what the value would be if the property were subdivided. Thus Mr. Thomas testified on behalf of appellee as follows:

> "Q. Mr. Thomas, you stated you based your value on the laundry property in this case on the highest and best use to which the property can be put. In your opinion, what is that use?
>
> A. Commercial.
>
> Q. In what sense?
>
> A. Well, it could be used for a skating rink, and ice rink, some kind of an amusement center. It really would have to be some kind of special use, I would say, where the people who used it could not afford to put much money into the land and still want a fairly good location. I took into consideration the potentialities, so far as residential is concerned. Due to the fact that the Federal Housing would not lend the money on the property in the vicinity, due to its blighted condition and type of residents, I think the highest and best use would be for some specialized line.
>
> Q. *Have you given consideration, Mr. Thomas, to the value of the property subdivided into lots?*
>
> A. *Yes, I have.*
>
> Q. *In your opinion would a subdivision of the property increase or decrease its value?*
>
> A. Decrease it.
>
> Q. How?
>
> A. Because of the cost that would be entailed in subdividing it, and the amount of available

property, and the fact that it would cost as much to build bungalows or flats there as it would in Pacific Heights, and the revenue would be very limited in proportion to what you could get in a better district." (R. 29 and 30.) (Emphasis supplied.)

Mr. Banker testified, also on behalf of appellee, as follows:

"The Witness. A. Well, *we took into consideration what the property might be sold for if it was subdivided and utilities put in.* We subdivided the Oddfellows' Cemetery and the Masonic Cemetery. I think both are located better than this. We sold the Oddfellows' off at about 65 cents a square foot, and the Masonic at about 90 cents, after the utilities were in.

Mr. Dreyer. Q. What would be the cost of placing utilities in this property if it were subdivided?

A. We would have to figure that out carefully, but I would imagine if you cut one street through it would be 275 feet, that would be the frontage on each side of the street, and it would cost about $15,000 to put in the utilities—between 12,000 and 15,000.

Q. What is the area of that property?

A. About 56,000 or 57,000 square feet.

Q. *By subdividing it would the value be increased or decreased?*

A. *Well, in my opinion you could not subdivide it and get $30,000 for the property.*" (R. 31.) (Emphasis supplied.)

Mr. Bufford, appellant's president, principal stockholder and present counsel, testified on behalf of appellant as follows:

> "Mr. Gaylord. Q. As to what, in your opinion, these lots, improved as outlined in the plan, can be sold for.
>
> A. They will have a value of about $2,000 a lot.
>
> Q. Talking about improved, what is the sale price?
>
> A. The land value.
>
> Q. I am not asking the land value; I am asking what the lots, improved as outlined in the plan, will sell for.
>
> A. About $10,000 a lot." (R. 96.)

There is absolutely nothing in the record to indicate that the Special Master did not give due consideration to this testimony.

THE FINDING OF INSOLVENCY WAS WITHIN THE ISSUES.

Appellant contends that the question whether the appellant was insolvent is immaterial—that a plan of reorganization can be effected under Chapter X even though the debtor is insolvent. It is undoubtedly true (and appellee has never contended otherwise) that under Chapter X a plan can be effected notwithstanding the fact that the debtor is insolvent. But in such case the stockholders must be excluded from any participation. (*Case v. Los Angeles Lumber Products Co. Ltd.,* 308 U. S. 106.) And only the creditors are en-

titled to vote on any plan which may be proposed in the proceeding. (*In re 620 Church St. Building Corporation,* 299 U. S. 24.) Where the creditors have rejected a plan submitted by debtor or its stockholders and it is unlikely that they will accept another, the proceedings will be dismissed. (*Oakland Hotel Company v. Crocker First National,* 85 Fed. (2d) 959.) In other words, the creditors cannot be compelled to accept a plan against their wishes. The debtor and its stockholders have no interest in the matter and it is none of their concern whether a plan should be effected or not. The creditors, and the creditors alone, are the only parties in interest. If they decide, as in this case, that no plan should be effected, that ends the matter, and the debtor and its stockholders are in no position to object. The question of appellant's insolvency was, therefore, a material,—if not the most important,—issue in the case.

THE PLAN WAS NOT FAIR, EQUITABLE OR FEASIBLE.

Appellant next argues that the plan which it proposed was fair, equitable and feasible. The Supreme Court's decision in *Case v. Los Angeles Lumber Products Co.,* supra, demonstrates beyond question that it was not.

THE COURT DID NOT ERR IN REFUSING LEAVE TO SUBMIT AN ALTERNATIVE PLAN.

The final argument advanced by appellant is that the court erred in refusing appellant leave to submit an alternative plan. It is clear from what has been said above that the court did not err in this respect. Sec. 236 of the Bankruptcy Act provides:

> "if no plan is approved by the judge and no further time is granted for the proposal of a plan * * * the judge shall * * * (2) where the petition was filed under section 128 of this Act * * * enter an order adjudging the debtor a bankrupt * * * or dismissing the proceeding under this chapter, as *in the opinion of the judge* may be in the best interests of the creditors and stockholders."

Whether upon disapproval of a plan the court should dismiss the proceeding or grant further time within which to propose another plan is entirely discretionary with the District Court. This court will not interfere with that discretion in the absence of a clear abuse thereof. (*Oakland Hotel Company v. Crocker First National Bank,* 85 Fed. (2d) 959.) Manifestly, there is no abuse of discretion in dismissing a petition and refusing to grant time to propose a further plan, where as here, it is unlikely, if not absolutely certain, that no plan can be effected which will comply with the Act as interpreted by the Supreme Court in *Case v. Los Angeles Lumber Products Co. Ltd.,* supra. In this connection attention should be directed to the fact that the court below in denying appellant's motion to reopen the case expressly found "that upon the facts of the case as presented to the Court and

upon the Report of the Special Master (heretofore approved), no plan could be proposed which would be acceptable under the provisions of the Bankruptcy Act * * *'' (R. 109.)

It is respectfully submitted that the order appealed from should be affirmed.

Dated, San Francisco,
March 2, 1942.

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